Supreme Court, U.S.
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No. 01-470

IN THE

SUPREME COURT OF THE UNITED STATES

JENNIS P. ("KAY") HARNISH,
Petitioner,
v.
AMERICAN AIRLINES, INC.,
Respondent.

On Petition for Writ of *Certiorari* To The
United States Court of Appeals for
The Fifth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. In a sexual harassment and retaliation case under Title VII of the Civil Rights Act of 1964, has the Fifth Circuit and the lower court ignored or misapplied this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.* 120 S.Ct. 2097 (2000)?

2. On Summary Judgement, did the lower courts violate the Seventh Amendment and Federal Rule of Civil Procedure 56 when they classified retaliation plaintiff's into two categories: those that make a "truthful, sincere complaint" of discrimination and those that assertedly make "manipulative or insincere complaints" and deny Title VII's retaliation protection and the right to a jury trial to the latter?

3. Are Defendants entitled at the summary judgment stage to rely as a matter of law on a "good faith belief" defense, e.g. an assertion that it discharged a sexual harassment complainant based on a good faith belief that while she engaged in her protected oppositional activity she engaged in misconduct or made "misrepresentations" to the employer even if the employee asserts she engaged in no such misconduct?

4. Are material issues of fact raised as to the Company's liability for sexual harassment misconduct of its Manager when the Manager engages in a violent rape of the employee off-premises and then uses his managerial power to prevents her promotion by his conduct including his use of the Company's performance evaluation system?

4. In light of the grant of certiorari in *National R.R. Passenger Corp. d/b/a Amtrak v. Morgan*, U.S. No. 00-1814, cert. granted 6/25/01, to determine the applicability of the "continuing violation theory" is Plaintiff entitled to trial on all of her sexual harassment allegations including those occurring more than 300 days prior to her EEOC charge filing under a continuing violation "equitable estoppel" theory?

LIST OF INTERESTED PARTIES

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TO THE HONORABLE SUPREME COURT:

Jennis P. ("Kay") Harnish respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit affirming the trial court's summary judgment.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not reported, is set out at p. A-1 Appendix to the Petition for Writ of Certiorari ("Pet. App."). The order of the District Court granting Respondent's Motion for Summary Judgment, which is not reported, is set out at p. A-3 of the Appendix and the Judgment of the Court is set out at p. A-7 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on June 6, 2001. The Petition for Writ of Certiorari is being filed on September 4, 2001. Jurisdiction of this Court exists under 28 U.S.C. 1254(l).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII.

Title VII of the Civil Rights Act of 1964:
42 U.S.C. 2000e-2 Unlawful employment practices

(a) Employer practices
It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin.

42 U.S.C. 2000e-3

Other Unlawful Employment Practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Federal Rule of Civil Procedure 56 provides, in pertinent part:

Rule 57 Summary Judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing

affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

I. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Plaintiff-Petitioner Jennis ("Kay") P. Harnish (Harnish) filed this action against American Airlines, Inc. (American) alleging, *inter alia*, unlawful sex and retaliation discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. [Title VII].

The United States District Court for the Northern District of Texas, Fort Worth Division, the Honorable Judge Terry R. Means presiding, granted summary judgment. (A-3). Harnish timely appealed and the United States Court of Appeal for the Fifth Circuit, Judges Emilio M. Garza, Parker and Ellison (sitting by designation), upheld the trial court's decision by unpublished decision of June 6, 2001 thereby dismissing Harnish's claims without trial. The Court has jurisdiction over this appeal under 28 U.S.C. §1291.

B. BACKGROUND AND HIERARCHAL STRUCTURE OF DFW RAMP SERVICES:

Harnish was a twelve year employee of Respondent American Airlines. In January of 1995, she transferred to a Supervisor/CSTL position in Ramp Services at DFW Airport. (16:3866-3867). Alleged sex harasser Michael Hill was a Level 5 Shift Manager; he admits that he was one of Harnish' supervisors. (18:4413, 4350-4351, 4428-4428, 4433, 4443-4444). Other supervisors included Bill Wilkshire, Mike McKanna and Jerry Culp. Mark Mitchell was the Administrative Ramp Manger over the Shift Managers. (RE 56; 16:3866-3868, 3877; 19:4625). William Wallace, Jr. was American's Vice President at DFW Airport. (RE 70-71; 18:4484-

4485, 4492-4493).

C. SEX DISCRIMINATION INCLUDING CONDUCT PRIOR TO 300 DAY CHARGE FILING PERIOD:

Harnish filed her EEOC charge on July 30, 1996. Her 300 day Title VII statute of limitations period commences on October 4, 1995. (18:4336; 19:4595). In early 1995, male workers including Mark Bowers made sexist statements and offensive sexual jokes. (17: 4203, 4206, 4208, 4210-4212). Employees also directed profanity and words of a sexual nature at her and referred to a certain female co-employee as having "crotch rash." (17:4204-4205, 4211-4212, 4214-4215).

Bowers also physically touched Harnish at work in an unwanted manner several times. On one such work occasion, Bowers jumped out from behind a cabinet and grabbed her wrist. (17: 4211-4212, 4229). Prior to October of 1995, Harnish estimates that she complained about twenty times to her supervisors that Bowers was harassing her. (17:4225, 4231; 18:4319) Manager McKanna's response to her complaints was just "deal with it." (17:4204-4206, 4211, 4222-4223, 4225-4226; 18:4319, 4456-4459). In the February to April, 1995 time period, Manager McKanna himself made sexual advances toward her which she opposed. (17: 4216-4218; 18: 4326, 4460-4463).

In May of 1995, Manager Wilkshire embraced her snugly and pulled her against his body. In April or May 1995, Manager Wilkshire commenced calling Harnish "the skirt," in a derogatory manner in "debrief meetings." He continued to call her the "skirt" through the statutory time period and up through June of 1996 even though she requested he not do so. (RE 56; 17: 4218, 4224-4225; 18:4257; 19:4625).

Other females also experienced sexual harassment on the ramp. According to Sally Samonek and Sharon Brooks Ruckner, female employees are subjected to lewd jokes and comments and sexually explicit pictures of naked or mostly naked females on the Ramp including drawings of male and female genitalia "all over

fleet services." (RE 58; 19:4563-4567; 4627)

Manager Culp warned Harnish that Managers McKanna, Hill and Wilkshire were attempting to get her fired. She explained to Manager Culp that she had refused to have sex with McKanna. He told her, I knew they were bad but not this bad about it. (RE 56; 19:4625)

D. HARNISH FILES HER FIRST INTERNAL CHARGE OF SEX HARASSMENT; SEX DISCRIMINATION CONTINUES:

On September 16, 1995, after yet another Bowers incident, Harnish complained to Manager Wilkshire telling him that she wanted the conduct stopped.(17:4225-4226). On September 18, 1995, Harnish talked to Vice President Bill Wallace. She complained to him about sexual harassment but stated that she feared retaliation. Harnish asserts that Wallace told her he was aware that there was sexual harassment on the ramp. (RE 66; 17:4227-4228; 18:4486)

On September 19, 1995 Harnish filed a written sexual harassment complaint. Human Resources representatives promised Harnish that the investigation would be completed "expeditiously" and in ten days." In fact the investigation dragged on for four months. (RE 63; 17: 4228; 4242; 19:4537).

On November 3, 1995, Harnish opposed discrimination by complaining to Human Resource Managers Brickhouse and Merlino of sex differences in treatment and job assignments being conditioned upon sexual favors. (17:4237, 4239).

E. EMPLOYEE HARNISH IS SEXUALLY HARASSED IN THE STATUTORY PERIOD BY MANAGER HILL AND THEN RAPED BY MANAGER HILL ON DECEMBER 3, 1995:

Manager Hill's sexual conduct continued into the statutory 300 day period. Manager Hill made sexual advances towards Harnish in the October-November 1995 time period. At that time

he was touching her, leaning into her and invited her to his house and hot tub several times. She found such sexual advances unwanted and declined the advances. (RE 58; 18:4304; 19:4627)

The Shift Managers invited their subordinates to socialize and drink with them as Manager McKanna admitted. On December 3, 1995, Shift Manager Hill and McKanna, then roommates, had invited their subordinate supervisors drinking and to their house. (18: 4350-4351, 4434, 4475-4476, 4478). That night Harnish was raped by Manager Mike Hill. (RE 58; 19:4627).

Managers Hill and McKanna had gone to a bar and spent the afternoon drinking with their subordinates supervisors including Harnish. (18:4352-4354). At the bar, Manager Hill treated her in an antagonistic manner and threw spit wads at her and in her beer. Hill asked her if she thought she was better than them. (18: 4275, 4293-4294).

Hill then asked the group to come to his house. Harnish objected and declined. Hill and McKanna were very insistent that she come; they did not take no as an answer. She feared that if she did not come, that she would be accused of not being social with the management and that it would affect her career. (18:4275 -4276, 4294-4296, 4355-4357, 4452).

At Hill and McKanna's house, Hill yelled at her and continued to be hostile towards her. A group including Harnish and Hill went dancing. On the ride back, Hill continued exhibiting anger at Harnish and began repeatedly hitting the back of her seat. Harnish stated, "What is your problem? Do you just want a blow job or what?" Harnish admits the comment made in anger but denies any oral sex physical activity. Passengers Rogstad and Majors have also consistently denied any oral sex activity. (18:4276-4277, 4297, 4300-4304, 4358-4363, 4367-4368, 4391; 19:4523, 4529-4534).

In contrast, with no support from any of the other witnesses, Manager Hill asserted in the subsequent sexual harassment investigation that Kay Harnish leaned over to the back seat,

exposed his penis and gave him oral sex in the car in front of passengers Rogstad, Majors and Souter. (18: 4364-4366, 4369-4376, 4436-4437, 4451, 4522).

Returning to Hill's house, Harnish went into the bathroom. Hill entered uninvited. He approached her and kissed her. In her confusion, she initially kissed back but when he became more insistent she pushed him back and told him, "No, No" and "No, you need to stop." (18:4304-4306). Harnish struggled forcefully with him. He remarked, "You think you're too good." He hit her against the wall and threw her down to the floor. (18:4306).

She attempted to fight him off and again told him to stop. Hill overpowered her physically. She blacked out. He then proceeded to have sexual intercourse with her against her will. Later, when Harnish' friend Becky Rogstad went back to the bedroom area, she found Plaintiff sitting on the floor in a traumatized state, crying and rocking back and forth. (18:4306-4309, 4333;19:4524).[1]

After Hill left, Manager McKanna came into the room. Plaintiff, who was upset, threatened that "You think you can f--k anybody that's on the ramp." She told him, "You guys better leave me alone and never come near me again." She then stated, "And you're not going to get away with this." (18:4309, 4334,; 19:4524) Hill acknowledges McKanna told him that Harnish had threatened that she was going to sue American. (18:4387-4388, 4435) Harnish went to the hospital; the hospital report documents bruises, lesions and tears. (RE 84-86; 18:4310-4312, 4339, 4531, 4558-4568).

Three days later, Harnish confronted Manager Hill at a retirement party. She asked him, do you realize how bad you beat me? His response was "So, I had fun." That night, the male

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[1] In contrast, Hill asserts that Harnish and he rolled around the floor in consensual foreplay and then had consensual sex after which time Harnish "looked relaxed and contented." (18:4379-4384, 4386, 4390).

Supervisors were bragging about Manager Hill's sexual conquests and he was laughing and agreeing with them. (RE 58; 18:4313; 19:4627)

Within six to seven days, Harnish became suicidal. She also feared for her physical safety and had fear of disease, as well as anger, loss of appetite and self confidence, nightmares, flashbacks, anxiety, nerves, lack of concentration, mental distraction, paranoia and feelings of being overwhelmed. (18:4283-4285, 4331-4332).

After the attack, an uneasy truce developed between Harnish and Managers Hill and McKanna. (RE 57; 19:4626). Harnish backed away from her prior threat to report Hill and McKanna because she feared for her personal safety and retaliation and feared for her job if she filed her complaint with the company and the EEOC. It also appeared to her that certain Managers were "untouchable." Further, she felt that American was ineffective in stopping sexual harassment after her prior experience and her knowledge of sexual harassment conduct against other employees of American. (RE 56-57, 61; 17:4245; 18:4272, 4479; 19:4602, 4625-4626, 4630).

F. POST RAPE-PRE DISCHARGE EVENTS INCLUDING DENIAL OF ASSIGNMENTS, INCOMPLETE PERFORMANCE EVALUATION AND DENIAL OF PROMOTABILITY RATING:

Harnish had requested from Manager Hill to go into other areas, including the LTS zone, Eagle zone and the "war room" which is the nucleus of the terminal operation. Experience there helps in promotability. Hill and McKanna never selected her for such assignments, choosing their buddies and those that they had gone out with instead. (18:4260,4337-4338, 4341-4342, 4344, 4473-4474). Manager Mitchell previously had recommended that Hill allow her to act as relief shift manager. Manager Hill refused to so assign her, however. One would need that experience to be a general manager in a smaller city or for any level 4 job in the Tower. (RE 59; 18:4263, 4337; 19: 4628).

In late June of 1996 Hill was selected for another position. At a farewell restaurant gathering, Harnish observed Hill's inappropriate sexual conduct. The next day in the work debrief session the employees were bragging about Hill's sex exploits. (RE 59; 18:4258-4249; 19:4628)

On June 20 or 24th, 1996, Hill gave her a performance review. He told her that it was his intention that she not be promoted. He had only rated her "3 S" and noted that she needed exposure to certain work areas - the same work areas that he had refused to which he had refused her assignment. The review was also incomplete which effectively lowered her score. (18: 4262-4263).[2] When Harnish complained about the review, Hill falsely told her it was "strictly internal" and would not affect her chances of getting a promotion outside of Ramp Services. She asked him to complete the review. He refused. (RE 59; 18:4262-4264; 19:4628). Harnish considered Hill's conduct retaliation towards her. (RE 59; 18:4267, 4266, 4466-4468; 19:4628). The "S" rather than "P" ranking forestalled her career; Hill admits that he cannot name anyone who was promoted who did not receive a "P" ranking.(RE 59-60; 18:4720, 4414; 19:4628-2629).

G. AMERICAN'S MANAGERS WARN HARNISH AGAINST FILING SEXUAL HARASSMENT COMPLAINTS AND THREATEN HER WITH RETALIATION;

Shift Manager Jerry Culp had told Harnish it was not a good thing to file harassment charges; that "American doesn't accept them." He told her that he'd known people that had been in

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[2] Harnish had expected a rating of "3 P" based on her work performance, work ethic and statistical numbers. Further, in November of 1995, Mitchell had recommended that Harnish pursue a level 4 promotion and had told her in conversations that she was promotable, thus leading her to believe that she would receive a "P" (promotable) rating. (18:4267, 4263, 4267).

her situation and that it had ruined their careers and they'd gotten fired for it. (18: 3440).

After she had filed her Bowers complaint, Manager McKanna confronted Harnish about the sex harassment complaint. He told her: "I resent that. Nobody has done that before on the ramp and you will regret that." He told her it could damage her career. Harnish found McKanna's threat intimidating. (RE 55; 17:4233-4234; 18:4340, 4464-4465; 4624).

On October 10, 1995 Harnish had a meeting with Manager, Harnish discussed a request to change zones to get away from Bowers, the sexual harassment investigation and delay in that investigation. She told Wilkshire that she might have to hire an attorney relating to the investigation. She also complained to Wilkshire that he was treating her differently relating to shift swap polices. Wilkshire called her a liar and stormed out of the meeting. (17: 4232, 4235). Wilkshire also labeled Harnish a "troublemaker" on at least four occasions. (17: 4218-4220)

In June of 1996, she made an appointment to meet with Vice President O'Hare. (RE 64; 17:4036) The day before the meeting, Manager Wilkshire warned her that she needed to think twice about going to O'Hare. He told her that if she went to see Don O'Hare that that would be a decision that "could ruin a career." He also reminded her she could have a long healthy career at American but that going to see Don O'Hare was "not a smart move." (18:4339-4330).

H. HARNISH PROTESTS DISCRIMINATION AND FILES HER INTERNAL COMPLAINTS OF SEX AND RETALIATION DISCRIMINATION AGAINST MANAGER HILL:

On June 28, 1995, Harnish met with Vice President O'Hare and Human Resources Representative Barbara Landers. She complained that there was sexual harassment on the ramp that was not being addressed and that harassment and retaliation had

her performance evaluation. (18:4270-4271).[3] She complained that the sexual harassment and retaliation had gotten worse. She further wanted to deal with the issues relating to Hill's rape before he was transferred so that he would not be allowed to prey on other females. She was further concerned about the affect of the evaluation on her career. (18:4268-4269).

During that meeting she sought assurances from O'Hare that if she went into details about the harassment and provided him documents would she be fired? He stated, "Absolutely not." She then complained of Hill's performance review: the fact that he was not following procedures, the lack of a "P" ranking and that he did not complete the review. Her discussion about the rape was brief. She showed O'Hare the hospital report. He looked at it but did not discuss it. She told O'Hare that Hill was trying to ruin her career and asked for the harassment and treatment to be stopped. (18:4272-4273).

I. AMERICAN CONDUCTS A BIASED INVESTIGATION INTO HARNISH'S ALLEGATIONS:

American conducted a lopsided and sexually biased investigation. The investigators interrogated Harnish twice for a total of over four and a half hours and the investigators threatened her with termination. (18:4321, 4323,4326-4327,4445-4450; 19:4528). In the interrogation, Investigator Shaver yelled at her and asked her invasive questions: he asked her about her sex life, her personal life, if she requested rough sex, if she undid Hill's belt or unzipped his pants. Shaver told her to make false statements on her written statement: he told her to write down that she liked kinky sex, that

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[3] Although American had concluded the Bowers investigation in January, American had not advised Harnish of the result. Nor was additional training on sexual harassment given. It appeared to Harnish that nothing had been done. (RE 56-57, 61; 17:4245; 18: 4272, 4479; 19:4602, 4625-4626, 4630).

she liked rough sex, and that she had unzipped Hill's pants. the story, they told her, that is "not how it happened." She was intimidated and coerced at the investigation. (18:4339, 4343)

American's Investigators obtained statements from several witnesses including Hill, McKanna, Harnish, Rogstad and Majors. (18:4402). Male Managers Hill and McKanna testified that the investigators were "professional" and that he was not coerced. Shaver left Manager Hill alone to write his own statement; he was not threatened with discharge. Manager McKanna also testified that he was not coerced. (18:4392-4405, 4471; 19:4579-4581). Alleged eyewitnesses to the alleged oral sex incident, Rogstad and Majors, were interweaved and did not confirm Hill's story that an oral sex incident had taken place.

J. AMERICAN DISCHARGES KAY HARNISH AND GIVES CONFLICTING VERSIONS FOR ITS REASONS FOR SO DOING:

American discharged Harnish. Despite having the hospital report showing injury and bruising and the statements of disinterested witnesses contradicting Hill's account, discharging official Wallace testified that American concluded that the alleged rape incident did not take place and as to sexual harassment they "did not find." (RE 75-76; 18:4496-4497). The company discharge letter signed by a second official states that the discharge was due to "your judgment" in the matter recently investigated and the fact that "I have lost confidence in your ability to work effectively with other employees and be a 'positive role model' for your co-workers and subordinates." (RE 82; 18:4329, 4335; 19: 4610).

Discharging official Wallace's testimony, however, shifts the reasons stating that Harnish was discharged for dishonesty and for filing a report with "ulterior motives." (RE 67-68; 18:4489-4490). (RE 67-69, 71-72; 18:4489-4491, 4493-4494). He states that Harnish was terminated "for the judgment that she made and how she handled and documented this -- this case .... and that she is "not a very truthful person." (RE 68-71; 18:4490-4493).

At the EEOC, the company completely altered its reason for discharge. At that time, the company asserted that Harnish was discharged "based on the act of oral sex in public." American stated:

> Second, if Ms. Harnish had wanted to inform American that she had supposedly been raped by a co-worker .... she had the right to do so. She certainly would not have been discharged for making such an allegation. **In fact, she was not discharged for making such an allegation. ... During the investigation, American learned that Ms. Harnish and Mr. Hill had engaged in oral sex in the presence of other persons in a vehicle traveling on a public road. This was the reason for Ms. Harnish's and Mr. Hill's discharges.** (RE 80-81, 83-84; 19:4608-4609, 4612-4613)(emphasis supplied).

K. HARNISH FILES HER EEOC CHARGE AFTER HER DISCHARGE:

Harnish filed her EEOC charge on July 30, 1996, after her discharge. (RE 46-48; 18:4336; 19:4592-4599). Harnish filed her charge within 300 days of her discharge and the rape by Manager Hill. However the alleged 1995 sexual harassment by employee Bowers and Managers McKanna and Wilkshire fall outside the 300 day period. She did not file her EEOC charge earlier because she was afraid after receipt of the threats and warnings of Managers McKanna, Wilkshire, Mitchell and Culp as well as because of her negative experience with American's Bowers investigation. (RE 52-53, 61; 19:4621-4622, 4630). Further, she had been raped after her internal complaint of sex harassment on the ramp by a ramp Manager who had told her "you think you're too good" and you think you are "better than us." (RE 55, 60-61; 18:4275, 4293-4294; 19:4624, 4629-4630). After the rape she was afraid of Manager Hill and simply too afraid both for her physical safety and for her job to file such a charge during her period of employment. (RE 52-53, 66; 18:4486-4488; 19:4621-4622) Further, immediately after the rape she was suicidal and suffering extreme emotional distress. She could not risk her mental and emotional health as well as her job by filing an EEOC charge against American, (RE 53; 19:4622).

II. SUMMARY OF THE ARGUMENT:

A. In a Title VII Sexual Harassment and Retaliation Case, the Fifth Circuit and the Lower Court Ignored or Misapplied this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.* 120 S.Ct. 2097 (2000):

1. The *Reeves* Holding:

In this Court's unanimous decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), the Court reversed the Fifth Circuit Court of Appeals' "pretext plus" burden of proof standard. In *Reeves*, this Court rearticulated that once a plaintiff establishes a *prima facie* case, and further submits evidences that the defendant's articulated reason for its employment decision is not to be believed, that such evidence *alone* is sufficient to permit the fact finder to infer discrimination. *Id.* at 8. As the court indicated "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is disassembling to cover up a discriminatory purpose." *Id.* at 9.

Furthermore, this Court indicated that in determining whether summary judgment or judgment as a matter of law is proper, that all reasonable inferences must be decided in favor of the nonmoving party. *Id.* at 10. Therefore, this Court held the reviewing court should *only* give credence to the evidence favoring the nonmoving party, unless the evidence presented is from disinterested witnesses and it is uncontradicted and unimpeached. *Id.* at 10. This Court's instruction appears to have been wholly ignored herein.

In *Reeves*, this Court indicated that ".... it follows that the ultimate question of liability ordinarily should not be taken from the jury...." *Id.* at 12-13. This instruction also appears to have been wholly ignored herein.

The *Reeves* decision follows in the footsteps of this Court's decision in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993), which held that one way to present evidence of pretext is to

demonstrate that the proffered reason is unworthy of belief:

> The factfinder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination .... no additional proof of discrimination is required.

Hicks, 113 S.Ct. at 2749.

2. Application of Reeves to the Instant Case:

While the district court made passing reference to the *Reeves* case, A-6, Petitioner respectfully asserts that the district court failed to apply its holding properly. The Fifth Circuit, in its unpublished opinion, (A-1,2), fails to mention and appears to ignore this Court's *Reeves* holding entirely. No serious effort appears to have been made by either court to apply the holding of *Reeves* to the facts of this case in this unpublished opinion.

a. Plaintiff Has Established a Prima Facie Case of Retaliation Discrimination Herein:

Plaintiff a loyal, hardworking twelve year employee who was qualified for her position, opposed sex and retaliation discrimination, was retaliated against, and ultimately lost her job after her complaints of discrimination. Harnish presents ample evidence of the following oppositional activity by Harnish and its resultant retaliatory threats and actions:

- Harnish protested sexual harassment and retaliation conduct to Managers Wilkshire, McKanna and Culp numerous times prior to September 17, 1995; (17:4225, 4231; 18:4319)

- Harnish filed an internal complaint of sexual harassment on September 19, 1995;

- On October 10, 1995 Harnish had a meeting with

Managers Wilkshire and Knott wherein she complained, *inter alia*, about the progress of the sexual harassment investigation. She told Wilkshire that she might have to hire an attorney relating to the investigation and complained that he was treating her differently relating to shift swap polices. Manager Wilkshire called her a liar and stormed out of the meeting. (17: 4232, 4235). He also labeled her a troublemaker on at least four occasions. (17: 4218-4220)

• Manager McKanna confronted Harnish and told her that he knew she had filed a sex harassment complaint. He told her: "I resent that. Nobody has done that before on the ramp and you will regret that." He told her it could damage her career. (RE 55; 17:4233-4234; 18:4340, 4464-4465; 4624).

• After the rape, she threatened American Airlines Managers Hill and McKanna that ".... you're not going to get away with this." (18:4309, 4334,; 19:4524) Hill acknowledges McKanna told him that Harnish had threatened that she was going to sue American. (18:4387-4388, 4435)

• Harnish attempted to take her promotion and evaluation concerns up the management chain but her managers ignored her.

• Harnish then wrote an e-mail complaint to O'Hare and a meeting was set for June 28, 19996.

• The day before Harnish met with Vice President O'Hare, Manager Wilkshire threatened her that she needed to think twice about going to O'Hare and that if she went to see Don O'Hare that that would be a decision that "could ruin a career." He also reminded her she could have a long healthy career at American but that going to see Don O'Hare was "not a smart move." (18:4339-4330).

• On June 28, 1995, Harnish met with O'Hare and Human Resources Representative Barbara Landers. After receiving assurances that she would not lose her job, she lodged her complaints of sex and retaliation discrimination. (18:4270-4273).

b. A "Suspicion of Mendacity Exits Herein:

American does not seriously contest that Plaintiff has made out a *prima facie* case of retaliation discrimination herein. In this case, there is ample evidence from which the jury could find a "suspicion of mendacity" with regard to the reasons for Harnish's termination. First, American told Harnish that her termination was due "to the recent investigation." Then, in a termination letter, it stated that the discharge was due to Harnish's "judgment." In deposition, discharging official Wallace states that the reason for the discharge was alleged "dishonesty" or "lying" and filing a complaint with "ulterior motives." (RE 82; 18:4329, 4335; 19:4610).

However in its position paper filed with the United States Government's EEOC, American shifted its reasons for discharge yet again, this time stating the discharge was "based on the act of oral sex in public." (RE 80-81, 83-84; 19:4608-4609, 4612-4613). Essentially, American Airlines has presented *at least* two contradictory reasons for Harnish's termination: (1) to a governmental agency, the reason was for engaging in oral sex in public and not because of her filing her harassment complaint or her manner or method of doing so and (2) under oath the reason was for "lying" and filing a complaint with "ulterior motive."

The jury is certainly entitled to view all the evidence, including the evidence of the employer's shifting reason for termination, and find that, based on the evidence, the alleged reason for Harnish's termination is pretext and the real reason was retaliation for her prior opposition to sexual harassment conduct.

c. Plaintiff Presents Additional Evidence of Discrimination and Pretext Herein Including Retaliation Following Her Oppositional Activities:

As noted *infra,* Harnish also was subject to statements of retaliatory animus and threats of career harm and discharge for filing sexual harassment complaints including statements by McKanna and Wilkshire to the effect that her career could be ruined and statements by Manager Jerry Culp, that McKanna, Hill and

Wilkshire were attempting to get her fired. [RE 56-57; 17:4233-4234; 18:4339-4340, 4464-4465; 19:4625-4626]. Indeed, the day before Harnish met with Vice President O'Hare, Manager Wilkshire threatened her that she needed to think twice about going to O'Hare and that if she went to see Don O'Hare that that would be a decision that "could ruin a career." He also reminded her she could have a long healthy career at American but that going to see Don O'Hare was "not a smart move." (18:4339-4330).

d. Additional Evidence of Pretext -- Timing Evidence:

Close timing between an employee's protected activity and an adverse action against her may provide a sufficient "causal connection" necessary for a showing of retaliation. *Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Circuit 1993); *Payne v. McLemore's Wholesale & Retail*, 654 F.2d 1130 n. 13 (5th Cir. 1991). The Fifth Circuit has recently reversed a district court's granting of summary judgment on a retaliation case, indicating that "suspicious timing," in the context of viewing "the totality of this evidence," may be sufficient to survive summary judgment. *Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398 (5th Cir. 1999).

Harnish presents striking timing factors similar to the *Shackelford* case. On June 25, 1996, Harnish requested a meeting with Vice President O'Hare regarding "sexual abuse" on the DFW ramp. (RE 64; 17:4036). On June 27, 1996, Harnish was warned by Manager Wilkshire that she needed to think twice about going to O'Hare and that such a move could "ruin a career" and was "not a smart move." (18:4339-4330) The next day, Harnish Met with O'Hare. (18:4270-4271) A few weeks later, Harnish was subjected to a one sided and sexist interrogation at the hands of American Airlines interrogators. Then, within three weeks, Harnish was terminated.

e. Other Evidence of Discrimination and Pretext:

In addition to the shifting reasons for discharge, the threats of retaliation, the suspicious timing, Harnish further presents evidence of prior sexual harassment that was ignored by American.

She further presents evidence that the sexual harassment investigation assertedly relied upon by the discharging official was one-sided and tainted by sexist bias.

Moreover, even given the bias of the interrogators against her and for her male Managers, the interrogators did not come up with any evidence substantiating Manager Hill's claims that she had had oral sex with him, one of the asserted reasons for discharge. In fact, the disinterested witnesses all deny that any such incident had ever occurred. Indeed the description of the incident is nigh near physically impossible and a fact finder might well find it incredulous that anyone believed Hill's version of events much less American Airlines.

Lastly, the favoritism and unremitting financial support that American showed so that Hill could fight Harnish's charges after the discharge also shows the unremitting bias of American Airlines.

Therefore, Harnish has both presented a *prima facie* case, and substantial evidence from which a jury may conclude that American Airline's purported reason for her termination was pretextual. It strains credulity to simply "buy off" on Defendant's version of events herein without trial.

B. On Summary Judgement, the Lower Courts Violated the Seventh Amendment and Federal Rule of Civil Procedure 56 When They Classified Retaliation Plaintiffs into Two Categories: Those That Make a "Truthful, Sincere Complaint" of Discrimination and Those That Assertedly Make "Manipulative or Insincere Complaints" and then Denied Title VII's Retaliation Protection and the Right to a Jury Trial to Plaintiff Whom They Implicitly Categorized as Belonging to the Latter Category:

1. The Court's Retaliation Findings Herein Rely on Improper Credibility Findings:

In granting summary judgment, the district court held that "Plaintiff has failed to show that she would not have been

terminated but for her protected conduct, which would have comprised the making of a truthful, sincere complaint of discrimination" to American. The district court held on summary judgment -- without benefit of citation -- that "Title VII cannot be read to protect employees who make manipulative or insincere complaints to their employers." (RE 34-35). The lower court held that "American reasonably concluded after a thorough investigation that such complaints were less than sincere, not completely truthful, and therefore seriously misguided given their potentially damaging effect on the reputations of American and Mike Hill."

In essence, the District Court has credited American's version of events and factually makes the determination that her complaints of sexual assault were "less than sincere", "seriously misguided", "not completely truthful", and "manipulative or insincere complaints." The Fifth Circuit summarily affirmed by unpublished opinion.

In so doing, the lower courts appears to divest from the jury its proper role in making credibility determinations with respect to her complaints including her complaint of sexual assault by Manager Hill, his counter assertion that she engaged in oral sex and the underpinning good faith nature of her complaint of sexual harassment.

2. The Seventh Amendment and Rule 56 preclude Credibility Assessments and/or Balancing of Conflicting Evidence:

The Seventh Amendment guarantees "the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII. Instead of heeding that Amendment and resolving the contradictions in favor of non-movant Harnish, both lower courts appeared to have "taken sides" in an apparent improper balancing of the evidence. In doing so, Harnish has come up short.

Thus, it is clear that some witnesses are lying in

circumstances in which Defendants' witnesses readily have motivations to lie - Manager Hill to escape a claim of sexual assault and harassment, Vice President Wallace and the other Managers to escape claims of sexual harassment and retaliation. As this Court noted in discounting the value of testimony of company officials in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468 (1962): "it is readily apparent that each of these persons was an interested party"

Where, as here, discharging official Wallace's testimony as to the reasons for discharge is contrasted squarely by the Employer's own position paper to the EEOC which discounts Wallace's reasons and give an entirely different reason for the discharge -- her alleged engagement in oral sex -- and where that incident of alleged oral sex is denied by Plaintiff and two disinterested witnesses, the implicit balancing of credibility at the summary judgment stage in the Employer's favor is especially egregious.

This is error as the contradictions in the evidence in this case on material issues are sufficient to preclude summary judgment under Rule 56. American should not be allowed to deprive Harnish of her jury trial by an overuse -- indeed a downright misuse -- of the summary judgment standards herein. Such crediting of the Employer's version of events flies squarely in the face of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986) and *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986) which mandate that only the evidence of the non-movant and uncontradicted, unimpeached evidence of the movant is to be considered.[4] It is thus improper for the reviewing jurist to choose

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[4] The over utilization of summary judgment has been criticized in the context of employment discrimination cases. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897 (1998); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L.Rev. 203

up sides by casting Plaintiff at the summary judgment stage as one of a group of employees who has made a "manipulative or insincere complaints to their employers."

Such a determination is also inconsistent with this Court's prior rulings which recognize the constitutional and Rule 56 mandate: e.g. inferences to be drawn from the facts must be left to the jury. See: *Sioux City and Pacific R.R. Co. v. Stout*, 84 U.S. 657, 664 ("It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge"); *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999) (summary judgment not appropriate where reasonable inference from undisputed facts can lead to either of two conclusions.)

C. Defendants Are Not Entitled as a Matter of Law to Discharge Sexual Harassment Complainants Who Assertedly Make "Misrepresentations" to the Employer Even if they Do so in "Good Faith."

Implicit in the Court's ruling is an apparent approval of the Company's assertion that if it does not believe a sex harassment complainant fully, it is allowed to discharge her for the "offense." Such a ruling flies in the face of this Court's holding in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964).

In that case, this Court rejected wholeheartedly the Employer's discharge defense that it had a "good faith" belief that the employee who was engaged in protected conduct had in actual fact engaged in misconduct. In rejecting the defense, this Court noted:

> In sum, 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the

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(1993).

course of that activity and that the employee was not, in fact, guilty of that misconduct.

> That rule seems to us to be in conformity with the policy behind 8(a)(1). Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. ....A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy 8(a)(1) right that is controlling.

Further, the ruling herein appears to ignore the standard for evaluation of protected oppositional conduct held by the Circuit Courts including the Fifth Circuit in the enforcement of Title VII's "participation clause." Thus, as the Fifth Circuit has long held:

> To effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise, we are compelled to conclude that a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices. *Payne v. McLemore's Wholesale Stores*, 654 F.2d 1139 (5th Cir. 1981). See also *De Anda v. St. Joseph Hospital*, 671 F.2d 850, 853 n.2 (5th Cir. 1982).

In *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1003, 1007 (5th Cir. 1969) the Fifth Court held as a matter of law that an employee that files an EEOC charge that contains material that the Employer views as scandalous, malicious or libelous is not stripped from the wide range of protection of the anti-retaliation statute because the employee is exercising a protected right under Title VII when he so files a charge.

In finding retaliation, this Court noted that "the employer may not take it on itself to determine the correctness or

consequences of the filing. *Pettway*, 411 F.2d at 1005.

Absent such protections, a company official can now attempt to act as "judge, jury and executioner" holding the power of a job over the heads of victims of sexual harassment who file internal complaints. Requiring complainants such as Harnish to lodge such complaints first with her employer but to then subject her to the peril of job loss if management chooses to disbelieve her or accuse her of "lying" or "misrepresentations" in her rendition of the traumatic events surrounding harassment allegations is simply too high a price for an employee to pay to enforce our nation's civil rights laws.[5] It should be the employer -- not the employee -- who acts at its peril by discharging a sexual harassment victim that it believes has lied. To do otherwise would be to allow the fox to guard the hen house.

D. Material Issues of Fact are Raised as to The Company's Liability For Sexual Harassment Conduct of its Manager When the Manager Engages in a Violent Rape of the Employee Off-premises and Then Uses his Managerial Power to Prevents her Promotion by Use of the Company's Performance Evaluation System?

1. The rape alone created a hostile and abusive environment

Manager Hill's vicious sexual attack created a hostile and abusive environment for Harnish.[6] Even a single incident of sexual assault can sufficiently alter the conditions of the victim's employment and clearly creates an abusive working environment.

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[5]It should be remembered that sexual harassment allegations are by their nature "he said/she said" allegations notoriously difficult to prove.

[6] Of course, Plaintiff also alleges that the sexual harassment conduct that occurred prior to the 300 day charge filing period is also actionable under the "continuing violation" theory.

As this Court has noted, actionable harassment encompasses all forms of conduct that unreasonably interfere with an individual's work performance or create an intimidating, hostile or sexually offensive work environment. *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).* Harnish suffered both physically and emotionally as a result of the attack. The fear engendered by the attack is one of the reasons she did not file an EEOC charge more promptly.

A trier of fact could also reasonably infer that Hill's non recommendation for promotion and refusal to complete the personnel evaluation form which stymied her promotion chances were motivated by gender and retaliatory animus as well as motivated by the fact that Harnish had previously spurned Hill's unwanted sexual advances. The jury can infer that these actions constituted tangible employment actions as did her discharge.

Moreover, a trier of fact could reasonably infer that Hill raped Harnish in part to get back at her for turning in sexual harassers at American of whom he clearly was one. In this case, it is the jury's call to determine whether the low evaluation, thwarted evaluation form and eventual termination of Harnish were caused by the nexus of her earlier complaints of harassment.

Furthermore, the treatment of Hill and Harnish following the investigation provides evidence of the company's sexist bias and gender animosity. While Harnish was terminated with no benefits following the investigation, Hill was awarded 52 weeks of severance pay. Furthermore, American has fronted the costs incurred by Hill as a defendant in this litigation, in amounts totaling more than $250,000. This provides further evidence that American is willing to protect its male employees over its female employees.

E. The Sexual Assault of Harnish Constitutes Actionable Conduct Under Title VII:

American argues that it cannot be liable under Title VII for the rape of Harnish because the event occurred at a private

residence while both Hill and Harnish were off-duty. . This argument is flawed. The location of the harassment has never been the sole factor in determining whether an employer is held liable for the harassment. Employers are not insulated from liability under Title VII solely because the harassment took place off-duty or outside of the employer's immediate premises. Rather the courts look to see whether there is a direct nexus between the off-premises harassment and the workplace.

Two of this Court's well-known sexual harassment cases involve off-premises conduct. In *Burlington Industries, Inc. v. Ellerth,* 912 F. Supp. 1101 (N.D. Ill. 1996), a significant amount of the sexually harassing conduct occurred in restaurants and hotels. In *Vinson v. Taylor,* 23 FEP 37 (D.D.C. 1980), the case underlying *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986), the first sexual assault of the plaintiff occurred in a hotel following a non-work related social dinner. Had location - rather than agency responsibility principles - been the motivating factor in determination of liability, this Court would have so indicated in either *Vinson* or *Meritor.* It did not because location simply is not the dispositive issue in determination of liability - it is the relationship of the harasser to the victim and the impact of the harassment of the victim on her at her workplace.

There are numerous factors which together demonstrate that there was a direct nexus between Harnish's employment and the events leading up to the rape. Harnish felt compelled to attend the day's social activities in order to maintain a good working relationship with her supervisors McKanna and Hill. (R. 18: 4275-4276). Hill and McKanna were, in fact, insistent that Harnish return to their house to continue the party. (R. 18: 4275-4276). Also, Harnish had observed that those employees who were favored by McKanna and Hill obtained preferred job assignments and thus received enhanced opportunities for promotion. (R. 17: 4239, 18: 4337-4339, 4473-4474). Furthermore, after Harnish received a lower than expected performance review from her attacker six months after the rape, Harnish realized that her job and her opportunities for advancement were being jeopardized by her harasser. (R.18: 4261-4264, 4267, 19: 4628-4629).

Other courts have held that off-premises conduct may form the basis of a sexual harassment claim. In addition to the Supreme Court cases previously cited, see, for example, *Bowers v. Radiological Society of North America, Inc.*, 101 F. Supp. 2d 691, 693 (N.D. Ill. 2000). In *Bowers*, the plaintiff was offered a job and a place to live by her supervisor. After accepting, the plaintiff began to experience sexual advances at home from her supervisor, which she rejected. *Id.* at 693. The supervisor then gave the plaintiff a low performance evaluation when the plaintiff moved out, and eventually fired her. *Id.* The court found that the events at home were intertwined with the events at the workplace and could form the basis of a Title VII claim.

F. In light of the grant of certiorari in *National R.R. Passenger Corp. d/b/a Amtrak v. Morgan*, U.S. No. 00-1814, cert. granted 6/25/01, to determine the applicability of the "continuing violation theory" is Plaintiff entitled to trial on all of her sexual harassment allegations including those occurring more than 300 days prior to her EEOC charge filing where she claims equitable estoppel principles apply?

Plaintiff complains of sexual harassment conduct relating to Bowers, Wilkshire, Hill and McKanna prior to the 300 statutory filing period. This Court has recognized and applied the doctrine of equitable tolling to toll filing deadlines in Title VII cases. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S.Ct. 1127, 1135, 71 L.Ed.2d 234 (1982). Indeed, this Court has recently granted certiorari to a case to resolve conflicts among the circuits with respect to the application of the continuing violation theory. *National R.R. Passenger Corp. d/b/a Amtrak v. Morgan*, U.S. No. 00-1814, cert. granted 6/25/01.

It is well settled that the purpose of the continuing violation doctrine is to allow aggrieved persons "the maximum benefit of the law." (*Zipes*, 455 U.S. *supra* at 395.) In *Zipes, supra* at 398, the Court pointed out that:

By holding compliance with the filing period to be

> not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to a waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

Thus, as this Court has long recognized, the requirement that a complainant file a charge with the EEOC within the 300-day statutory filing period is "subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. *supra* at 393; See *also, Irwin v. U.S. Department of Veteran's Affairs*, 498 U.S. 89 (1990); *Baldwin County Medical Center v. Brown*, 466 U.S. 147 (1984).

Lower Courts including the Fifth Circuit has noted, the filing deadline is subject to equitable modification, i.e., tolling or estoppel, when necessary to effect the remedial purposes of the statute. *Clark v. Resistoflex Co., A Div. Of Unidynamics Corp.*, 854 F.2d 762, 765 (5th Cir. 1988). Equitable tolling is permitted if the interests of justice so require and there is no prejudice to the defendant. *Pioneer Investment Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

This case presents a compelling argument for the equitable modification of the 300 day limit due to the egregiousness of the Employer's conduct. Of course, the issue of whether the doctrine of equitable tolling applies involves questions of fact. *See Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992). Such factual questions make summary judgment particularly inappropriate. In *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 881 (5th Cir. 1991). *Id. See also Pruet Prod. Co. v. Ayles*, 784 F.2d 1275, 1280 (5th Cir. 1986).

In the instant case, under a continuing violation "equitable estoppel" theory, Plaintiff asserts that she is entitled to recover for sexual harassment conduct that occurred 300 days prior to EEOC charge filing as she asserts that she was prevented from earlier filing, *inter alia*, because she feared retaliation because of Defendant's retaliatory threats of discharge and coercive acts including violent rape by one of its Managers. Plaintiff asserts that

several Managers affirmatively sought to dissuade her from exercise of her rights including Managers Hill, McKanna, Culp and Wilkshire. Such repeated threats of physical and career harm - coupled with actual physical harm and actual career damage for having filed an internal harassment complaint - are certainly stronger than the conduct in *Zipes*.

In addition to the threats of physical and career harm - as well as actual physical harm at the hands of Manager Hill - American can also be said to have "lulled" her into inaction and delay in the filing of her EEOC charge during the pendency of the initial Bowers sexual harassment investigation. Thus, in September 1995, Harnish was informed that American would investigate her claims and get back to her within 10 days. [R. 17-4228, 4242; 19-4537, 4630] The investigation, however, took closer to four months. In the meantime, the 300 days were running on the time in which she had to file her EEOC charge.

Plaintiffs are encouraged - if not required - in sexual harassment cases to first file an internal complaint and allow the Employer to investigate. While the investigation was pending there was the hope that at its conclusion American would take strong remedies that would stop harassment and retaliation and obviate the need for the EEOC filing.

American should not be now heard to argue that some of Ms. Harnish's sexual harassment allegations are time barred when its Managers threatened her with harm if she filed pursued sexual harassment allegations and otherwise discouraged her from complaining of sexual harassment, and then assured her that they were performing a timely investigation, with the implied hope of an effective remedy. Harnish had the right to wait to see if American would handle her complaints in an adequate fashion and American should not be heard to now complain for the period of the pendency of the internal sexual harassment investigation.

Of course, while Harnish was waiting for such investigation, an American Airline Manager, Mike Hill, brutally raped her after his roommate Manager McKanna had threatened her and after Hill

himself had taunted her that she thought she was "too good." That rape rendered her emotionally incapable of taking further action against American. [R. 18-4486-4488; 19-4621-4622].

In *Stoll v. Runyon*, 165 F.3d 1238, 1242-43 (9th Cir. 1999), the court held that the Plaintiff was entitled to equitable tolling because the intense and continued sexual harassment she had endured at her place of employ, including being raped by one of her supervisors, had left her so traumatized that she could not function with respect to the lawsuit during the suit filing period. *Id.* Such precedent is certainly applicable herein. See also, *Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993),* in which the Tenth Circuit reversed summary judgment for the employer in a sexual harassment case in which the plaintiff had been raped by her supervisor. Much later, after her termination, the plaintiff filed a charge of discrimination, and the Court held the earlier events including the rape were timely pursuant to the continuing violation theory.

The procedural requirements of Title VII should not be allowed to become so formidable and inflexible as to preclude the aggrieved employee from receiving relief from employment discrimination. A balancing of the equities strongly suggests that this court should preclude summary judgment on the timeliness of Plaintiff's charge.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 00-1-871
JENNIS P. HARNISH (also known as "KAY")
Plaintiff-Appellant,

VERSUS

AMERICAN AIRLINES, INC., ET AL,
Defendants,

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(4:98-CV-476-Y)

June 6, 2001

Before EMILIO M. GARZA, PARKER, Circuit Judges, and ELLISON, District Judge.[7]
PER CURIAM:[8]

Having reviewed the record and considered the applicable

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[7]District Judge of the Southern District of Texas sitting by designation.

[8]Pursuant to 5th cir. R. 47.5, the Court has determined that this opinion should not be published as is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

authority and arguments of counsel, we affirm essentially for the reasons set forth in the district court's July 12, 2000 Order.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JENNIS ("KAY") P. HARNISH,	§	
	§	
VS.	§	ACTION NO. 4:98-CV-476-Y
	§	
AMERICAN AIRLINES, ET AL.	§	

ORDER GRANTING DEFENDANT AMERICAN AIRLINES, INC.'S MOTION FOR SUMMARY JUDGMENT
(Filed July 13, 2000)

Pending before the Court is Defendant American Airlines, Inc.'s Motion for Summary Judgment, filed April 3, 2000 [doc. # 111-1]. Having carefully considered the motion, response, and reply, the Court finds that the motion should be GRANTED. The Court concludes that no genuine issue of material fact exists with respect to any of Plaintiff's claims. Plaintiff's loosely organized arguments and evidence intertwine fact with rumor, speculation, and groundless opinion. The Court finds that only a brief discussion and statement of findings are necessary.[9]

This highly contested action involves an allegation of employment discrimination based on sex. In scattershot fashion,

---

[9]The Court notes the 41 objections to Plaintiff's summary judgment evidence, filed by American Airlines on June 2, 2000. Although the Court opines that most of those objections should be sustained, the Court nevertheless considered all of Plaintiff's proffered evidence in deciding to grant summary judgment.

Plaintiff has alleged an assortment of harassment claims against virtually all of her male supervisors and a number of her male co-workers at American Airlines ("American"). The centerpiece of her case is an allegations that she was raped by defendant Mike Hill, another employee of American, at his home on December 3, 1995, after an afternoon and evening of mutual fraternizing with friends and fellow employees outside the workplace. Plaintiff did not report this incident to American for six months. She came forward with her complaint only after she received an unanticipated "satisfactory" performance rating from Hill, who by that time was her direct supervisor. After an investigation conducted by American, both Plaintiff and Hill were terminated from their positions. American concluded that Plaintiff exercised poor judgment and seriously mischaracterized the nature of her allegation against Hill.[10] Hill was terminated because he became sexually involved with a subordinate and nevertheless participated in the subordinate's performance review.

Having reviewed the summary judgment evidence, the Court makes the following findings:

1. Plaintiff cannot recover under Title VII for events occurring before October 4, 1995, 300 days before she filed her initial charge of discrimination. See 42 U.S.C. §2000e-5(e)(1). The Court finds no grounds to apply the doctrines of equitable tolling or estoppel.

2. None of the alleged events occurring after October 4, 1995, were sufficiently severe or pervasive to assert a successful claim for hostile working environment under Title VII.

3. The alleged sexual assault of Plaintiff by Mike Hill is not actionable under Title VII. The incident occurred at Hill's

---

[10]After interviewing Plaintiff, Hill, and a number of witnesses, American found that Plaintiff had omitted crucial details surrounding the events of December 3, 1995, suggesting that the sexual encounter was consensual.

home, while both parties were off-duty. The Court finds no meaningful connection between the workplace environment at American and a voluntary decision among employees to socialize off-premises after work.

4. Plaintiff has failed to direct to Court to any competent summary judgment evidence to show that she was qualified and applied for any promotions during the statutory period. Additionally, Plaintiff made no mention of the denial of any employment opportunities when she filed her initial complaint with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff thus may not recover under Title VII for any alleged failure to promote or denial of advancement opportunities.

5. Plaintiff cannot recover under Title VII based upon the "satisfactory" performance rating she received from Mike Hill. Particularly when such rating is consistent with prior ratings, a determination that an employee's performance is satisfactory is not an adverse employment action.

6. Plaintiff has provided the Court with no credible reason to doubt American's legitimate, non-discriminatory reason for her termination. Although a causal relationship certainly exists between Plaintiff's complaints to American and her ultimate termination, American reasonably concluded after a thorough investigation that such complaints were less than sincere, not completely truthful, and therefore seriously misguided given their potentially damaging effect on the reputation of American and Mike Hill. Plaintiff has offered no evidence to suggest that American's proferred reason was a pretext for retaliation. While Plaintiff does not need to show evidence of actual discriminatory intent to survive a motion for summary judgment, she does need to come forward with sufficient evidence to find that American's asserted justification is false. *See Reeves v. Sanderson Plumbing Pros.*, 120 S.Ct. 2097 (2000). Plaintiff has failed to show that she would not have been terminated but for her protected conduct, which would have comprised the making of a truthful, sincere complaint of discrimination to American. Title VII cannot be read to protect employees who make manipulative or insincere complaints to their

employers.

7. Plaintiff's tort claims are barred insofar as they are based on conduct occurring before June 1, 1996, two years before Plaintiff filed this action. The Court has already held that there are no grounds to apply the continuing tort doctrine.

8. Plaintiff's claims for invasion of privacy are wholly without merit. The Court concludes that American's investigation of Plaintiff following her initial complaint in no way constituted an intrusion upon her solitude, seclusion, or private affairs. Additionally, no highly intimate or embarrassing facts about Plaintiff were disseminated by American to the public at large.

9. Plaintiff has offered no evidence to suggest that American engaged in any "extreme and outrageous" conduct sufficient to prevail on a claim for intentional infliction of emotional distress.

10. Plaintiff has offered no evidence other than unsupported, conclusory statements regarding her claim for false imprisonment.

Therefore, for the reasons stated above, it is ORDERED that defendant American Airlines, Inc.'s motion for summary judgment is GRANTED. All claims asserted against defendant American Airlines in this cause are hereby DISMISSED WITH PREJUDICE.

SIGNED July 13, 2000.

/s/
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

TRM/val

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JENNIS ("KAY") P. HARNISH,	§	
	§	
VS.	§	ACTION NO. 4:98-CV-476-Y
	§	
	§	
AMERICAN AIRLINES, ET AL.	§	

RULE 54(b) FINAL JUDGMENT
(Filed July 13, 2000)

Pursuant to the order issued this same day, and Federal Rule of Civil Procedure 54(b),

Finding no just reason for delay, it is hereby ORDERED, ADJUDGED, and DECREED that all claims asserted against defendant American Airlines, Inc., in the above-styled and numbered cause are DISMISSED WITH PREJUDICE. All costs under 28 U.S.C. §1920 shall be borne by the plaintiff.

SINGED July 13, 2000.

/s/
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

TRM/val

Supreme Court, U.S.
FILED
OCT 18 2001
OFFICE OF THE CLERK

No. 01-470

In The

Supreme Court of the United States

JENNIS P. ("KAY") HARNISH,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Pursuant to Supreme Court Rule 10, has Petitioner established "compelling reasons" for the writ?

II. Did the Lower Courts correctly hold that Petitioner's claims based on events occurring on or before October 4, 1995, are barred by limitations?

III. Did the Lower Courts correctly rule that an alleged off-premises, off-duty assault that is not employment related cannot be the basis for a Title VII harassment claim against an employer?

IV. Did the Lower Courts correctly rule that, as to claims not time barred, Harnish did not establish a *prima facie* case of hostile work environment sexual harassment?

V. Did the Lower Courts correctly rule that misrepresentations, mischaracterizations, ulterior motive and an off-premises, off-duty conduct not employment related do not qualify as protected conduct under Title VII's opposition clause?

VI. Assuming *arguendo* that Harnish established a *prima facie* case of retaliation, then did she establish sufficient evidence of pretext to avoid summary judgment?

CORPORATE DISCLOSURE STATEMENT

Respondent American Airlines, Inc. is a subsidiary of AMR Corporation, a publicly held company. No publicly held company owns 10% or more of the stock of AMR Corp.

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COUNTER STATEMENT OF THE CASE

Contrary to pp. 22 and 24 of the Petition, the lower courts did not make credibility determinations or take sides. Rather, the lower courts relied on Harnish's own deposition testimony admitting misrepresentations, mischaracterizations, ulterior motive, and material omissions. These matters are hereinafter explicated and corrected.

I. Background and Relevant Organizational Structure.

From July 1990 to January 1995, Jennis Harnish (hereinafter "Harnish") was a level 3 manager at American Airlines, Inc.'s ("AA") Admiral's Club in San Diego, California. (R2432). In January 1995, Harnish applied for and received a lateral transfer to the Dallas/Fort Worth International Airport ("DFW"). (R2850).

At DFW, Harnish was a level 3 supervisor (a/k/a Customer Services Team Leader) in the Ramp Services department. (R2438). She was one of 40 to 45 supervisors. (R4260). A level 3 supervisor reported to a level 5 shift manager. There were nine or ten shift managers. (R4601). Shift managers reported to Mark Mitchell, Manager of Ramp Services. (R4601). Mitchell reported to William Wallace, Vice President at DFW Airport. (R4484). In turn, Wallace reported to Don O'Hare, Senior Vice President. (R4605).

II. Harnish's Awareness of the Nature of the Alleged Sexual Harassment That Had Discontinued by the End of September 1995.

Harnish claims that from January 1995 through September 1995, three men sexually harassed her or took actions based on her gender. First, Harnish claims that, between March 1995 and September 1995, Wilkshire embraced her once, called her "skirt," and branded her a

troublemaker. (R2496, 2366, and 2591-92). The last such act was in September 1995. (*Id.*).

Second, Harnish claims that McKanna indicated he would show her favoritism if she went out with him. (R2459). The last such act ended June 1995. (R2459).

Third, Harnish asserts that, prior to September 19, 1995, her subordinate employee, Mark Bowers, touched her, made lewd jokes, showed her a computer entry containing the phrase "crotch rash," and said he would comply with her instruction if she kissed him. (R2312-14). After September 27, 1995, Bowers did nothing of a sexual nature towards Harnish. (R2473-74).

Prior to October 4, 1995, Harnish believed the aforegoing acts of Wilkshire, McKanna, and Bowers were sexual harassment. (R2590-93; 2463-64; 2453-55; 2647; 2465-66; 2590; 2313). In early August 1995, Harnish spoke with Cathy Fragnoli, a friend who is an attorney. Harnish asserted she was being sexually harassed and requested a referral to an attorney. Fragnoli referred Harnish to an attorney named Mallory. (R2578-79; 2593). Harnish obtained legal advice from Mallory. (R2593). In September 1995, she complained in writing to AA about Bowers and met with representatives of AA's Human Resources Department. (R2469-70; 2647). Subsequently, Bowers was disciplined. (R2697).

III. According to Harnish's Deposition Testimony, the Alleged December 3, 1995 Sexual Assault was not Employment Related.

On December 3, 1995, Harnish got off work early afternoon and went back to her house and spoke with her parents, who were visiting from Oklahoma. (R2540-41). While at home, Harnish called Cathy Thompson's house where mutual friends from San Diego, Becky Rogstad and Bob Majors, were visiting. (R2536; 2541-42). Majors and Rogstad had traveled to Dallas-Fort Worth for entirely

social reasons. (R2537) Both had spent the night of December 2, 1995, at Thompson's house. (R2538-39). There was an interest between Rogstad and McKanna. In speaking with Harnish, Rogstad stated that she had spoken with McKanna and he wanted "her to meet him at a restaurant in Arlington called the Scoreboard." (R2542). At Rogstad's request, Harnish agreed to go to Scoreboards. (R2542). Harnish then drew a map to show her parents how to get to the Scoreboard and drove separately to Thompson's house to pick up Rogstad and Majors. (R2542-44).

Harnish and her friends arrived at the Scoreboard Sports Bar at about 3:00 p.m. and stayed until 7:00 or 7:30 p.m. (R2524-25). When they arrived, Harnish's parents were already there. (R2545). While at the Scoreboard, Harnish consumed alcohol. (R2546).

After leaving the Scoreboard, some of the group continued on to Hill's house to party. (R2547-48). After speaking to Rogstad, Harnish decided to go to Hill's house. (R2527). Harnish went to be with her friend, Rogstad. (R2527).

Harnish and her friends arrived at Hill's house at 7:00 or 7:30 p.m. (R2528). Harnish consumed additional alcohol. (R2529). Eventually, Rogstad suggested leaving to go country and western dancing, and Hill suggested that they go to Cowboys. (R2551). AA was not responsible for Harnish's visit to Cowboys. (R2529).

Harnish drove her car to Cowboys, and Majors, Rogstad, Hill, and Deidre Souter were passengers. (R2552). When the group arrived, everyone went to the bar and ordered still additional alcohol. (R2552-53). Upon returning from the restroom, Harnish had some difficulty locating her friends. (R2556). Harnish got into a disagreement with the bouncer and was told that she had to leave the bar. (R2557). The bouncer told Harnish that he

thought she had had too much to drink. (R2559). Eventually Rogstad found Harnish who was "crying and was very upset." (R2835-36). Rogstad states that on a scale of 1 to 10 with 10 being sobbing with shoulders heaving and gasping for breath, Harnish was "probably right close to 10." (R2837-38).

The group then left, and Majors drove back to Hill's house. (R2839). En route Harnish asked Hill "do you just want a blow job or what?" (R2562). No one else in the group had used the phrase "blow job" that evening. (R2562). Harnish admits she leaned into the back seat from the front passenger seat "and he and I unzipped his pants and I pretended to act like I was going to pull his penis out in front of everybody." (R2737). Hill and Harnish dispute whether she performed oral sex on him. (*Id.* and 2816).

The group arrived back at Hill's house at 10:15 to 10:45 p.m. Rather than drop off the passengers and go to her home, Harnish decided to re-visit Hill's house because she "didn't think it was responsible to leave people." (R2622-23). Harnish alleges that while she was in the bathroom at Hill's house, Hill approached her and began kissing her. (R2566-67). Harnish returned his kisses. (R2568). Harnish has admitted in writing that, before intercourse, she "finished pulling my pants down and pulled one leg out of my pants." (R2735-38). While Hill and Harnish were in the bedroom and engaged in intercourse, Rogstad knocked on the door and asked, "Kay, are you all right?" (R2832) Harnish responded by stating, "Go away." (R2735-38; 2832). Harnish alleges that Hill physically overpowered her, and the intercourse was non-consensual. Hill alleges the intercourse was consensual. (R2316).

After the sexual encounter was completed, Harnish asked her friends, Rogstad and Majors, to take her to the hospital, claiming she had been raped by Hill. (R2569).

Her friends refused and instead took her to Cathy Thompson's house. (R2569-70). When they arrived at Thompson's house, Harnish refused to leave the car. (R2570). Thompson also refused to take Harnish to the hospital. (R2570-71). Her friends then left her in the car. (R2571-72). Harnish eventually exited the car and wandered the neighborhood for about thirty minutes before knocking on a stranger's door and asking her to call a cab. (R2573-74). Instead of a cab, two police officers showed up. (R2575-76). The police officers then took Harnish to Harris Hospital. (R2577). The hospital noted that Harnish had an "odor of alcohol on breath." (R2730).

The day after the alleged sexual assault, Harnish telephoned Hill and apologized for her conduct. (R2522-23).

Later in December 1995, Harnish consulted her personal attorney about the alleged sexual assault but did not mention it to AA. (R4622).

IV. Harnish's Subsequent Acts and Favorable Description of Her Relationship With Hill Prior to Her Receipt of Her June 24, 1996 Performance Evaluation.

After the alleged sexual assault, Harnish reported to work on her next scheduled workday. (R2334). In the immediately following weeks and months she did not report any alleged assault to AA. Nor did she file criminal charges against Hill (she did not do so until 1997). (R2579-80).

Prior to March 1996, Hill had not been Harnish's administrative manager and thus would not have been in the position to conduct her next performance evaluation or impose discipline. In March 1996, AA granted Harnish's bid to work in Hill's zone. (R2479-80). In March 1996, Hill became her administrative manager. (R3233).

By June 1996, Hill was scheduled to transfer to a job in another state. On June 16, 1996, Harnish gave a glowing description of her past and present working relationship with Hill. She wrote, "Its (sic) been a pleasure working with you this past year and a half! I'll miss you!" (R2699). As admitted at page 9 of her Petition, during non-duty hours, she also attended an off-premises going-away party for Hill not sponsored by AA.

Harnish admits to many performance deficiencies. She was relatively new to Ramp Services, and in terms of experience would have been behind most of the other 40 to 45 supervisors. She encountered a learning curve. She admittedly required "extensive coaching and counseling" concerning "how to perform her job." (R2509-10). Harnish had admittedly been counseled by her managers on numerous occasions concerning performance deficiencies. (R2484; 2460; 2485-86; 2461; 2482-83). Harnish further had developmental needs. (*Id.*). On June 23, 1996, the day before her June 1996 performance evaluation, she wrote, "I HAVEN'T SEEN ME WALKING ON WATER LATELY." (R2852). (caps orig.). Needless to say, before receiving the evaluation, Harnish did not expect it to be high. (R4261).

On June 24, 1996, Hill gave Harnish her evaluation. (R2506).

V. Harnish Complains That Her June 1996 Evaluation is an "INSULT" That Will "Ruin" Her Career, Alleges "EXTENSIVE SEXUAL ABUSE" That Has "GOTTEN WORSE," and Raises the Specter of a "CRIMINAL ACTION" That Will "NOT BENEFIT" AA.

On June 24, 1996, Harnish complained in writing to Mark Mitchell, Manager of Ramp Services. (R2705). She characterized her evaluation as an "INSULT." (R2705). (caps orig.)

On June 25, 1996, Harnish sent an e-mail to O'Hare. In it, Harnish (1) sought a personal appointment, (2) alleged "EXTENSIVE SEXUAL ABUSE ON THE DFW RAMP" that supposedly had "GOTTEN WORSE," and (3) raised the specter of a "CRIMINAL ACTION THAT WOULD NOT BENEFIT AMERICAN AIRLINES." (R2706). (caps orig.)

When Harnish met with O'Hare on or about June 28, 1996, she first complained to him about sexual harassment on the ramp in general. (R2517-18). She then complained about her evaluation, which she had not mentioned in her e-mail. (R2518). She claimed that her June 1996 evaluation was so poor it would "ruin" her career. (R4271-73). Lastly, she raised the issue of her alleged rape by Hill, her administrative manager who had conducted her performance evaluation. She said a rape investigation would be embarrassing to AA. (R2522).

VI. The Investigation Places Harnish's Trustworthiness in Doubt, and She Admits to Misrepresentations/Mischaracterizations, Ulterior Motive, and Material Omissions.

O'Hare asked AA's security department to perform an investigation. Numerous witnesses were interviewed and re-interviewed. Harnish has admitted to misrepresentations, mischaracterizations, material omissions, and ulterior motives.

A. Harnish Admits That as of June 1996, on the Ramp There Was Not "EXTENSIVE SEXUAL ABUSE," Much Less Extensive Sexual Abuse That Had "GOTTEN WORSE."

In her letter to O'Hare, Harnish had stated that "ON THE RAMP" there was "EXTENSIVE SEXUAL ABUSE" that had "GOTTEN WORSE." (R2706). In deposition, Harnish testified that in her mind, "SEXUAL ABUSE" is a

higher form of sexual harassment involving greater hostility, physical touching, and persistent unwelcome behavior. (R2430-31). This is the meaning she intended to convey to O'Hare in her e-mail. (R2513).

Harnish's representation was admittedly false. She testified that she was sexually harassed by four men – Mark Bowers, Mike Hill, Mike McKanna, and Bill Wilkshire. (R2534-35). The acts she attributes to Bowers, McKanna, and Wilkshire had ended before October 1995. (R2469-70; 2459; 2496-97; 2366). The only behavior by Hill (other than the intercourse, which certainly did not occur "ON THE RAMP") that Harnish alleged to constitute sexual harassment toward her was when, at a bar in October/November 1995, he sat close to or leaned into her and invited her to parties at his house. (R2563-65; 2315). Thus, Harnish's own testimony is that any alleged sexually harassing conduct had ended at least seven to eight months before her complaint to O'Hare. Harnish also admits that the jokes and language that she had allegedly found to be offensive back in 1995 had decreased, *i.e.*, conditions had improved on the ramp by June 1996. (R2512-13).

B. Harnish Admits to Misrepresentation/Mischaracterization of Her Performance Evaluation of June 1996.

Contrary to her written characterization, in deposition Harnish admitted that the evaluation was not an "INSULT." (R2705; 2506). Harnish's June 1996 evaluation was admittedly good and could not reasonably be construed as "ruining" a career or, as asserted on p. 26 of the Petition, "jeopardizing" a job. Harnish received a "3 – Fully Competent" rating, and her promotability was tracked as an "S." (R2703-04). Harnish was one of 40 to 45 ramp supervisors, and under AA's guidelines, two-thirds of them were to be rated "Fully Competent," which is

defined as "Solid Performance. Consistently Meets Expectations." (*Id.*; 2703-04; 4260). Under the "Competencies" section of the review, Harnish was rated as "Fully Competent" in seven categories and "Strong" in two categories. (*Id.*). Harnish was not rated below "Fully Competent" in any categories. (*Id.*). "S" is defined as "Capable of moving to a job with similar or expanded responsibilities within level." (*Id.*). Harnish occupied a level 3 position; there were no level 4 positions in Ramp Services, and she admits that the "S" rating would not prevent her from being considered for higher level positions outside Ramp Services. (R2822).

Harnish's June 1996 evaluation was better than her 1995 evaluation. It certainly had not "ruined" or "jeopardized" her career, but rather, had allowed her to transfer from an Admiral's Club position in San Diego to a position in Ramp Services at DFW. Remarkably, the performance deficiencies on her June 1996 evaluation mirrored those noted on her June 1995 evaluation concerning her work at the Admiral's Club in San Diego. Under the "managerial profiles" section of the review, which is intended to be "used when evaluating candidates for promotion," Harnish was rated as having only "average" skills in three areas, and as only "acceptable" in two, including "reaction to pressure" and "interpersonal skills." (R2639-44). The coaching and counseling section of Harnish's June 1995 review indicated that she "allowed her personal opinions/personality conflicts with specific individuals to get in the way of achieving the Corporate Objectives and ensuring total teamwork at a station level." (R2641-44). That section also indicated that Harnish needed improvement in "Dealing with discipline or uncomfortable situations without getting emotional." (Id.).

C. Harnish Admits to Facts Demonstrating an Ulterior Motive.

Hill had been selected for a position in another state. His shift manager was a level 5 position. Harnish's supervisor position was a level 3 position. There were no level 4 positions on the DFW ramp. Although she was relatively new to ramp operations, was one of 40 to 45 supervisors, and had less experience than most of the other supervisors, Harnish decided that she should be selected and allowed to skip level 4 and be promoted from her level 3 position into the level 5 position that Hill was scheduled to vacate. (R4620; 4258; 2512). While not impossible, skipping a level would have been very unusual, as would being selected over other supervisors with more skill. No one had told Harnish she was ready for a two-step promotion to shift manager. (R2505). Harnish felt she needed an unusually high evaluation as she embarked on her "QUEST FOR PROMOTION" to Hill's job. Harnish felt that her promotability needed to be tracked as a "P" (tracked for immediate promotion "today"). (R2703; 2507, 2516).

On June 24, 1996, when Harnish received her evaluation, she was dissatisfied, believing the evaluation would not enable her to achieve a two-step promotion into the position Hill was going to vacate. (R2515-16). Harnish then embarked on the following course of conduct.

Help Me in my "QUEST FOR A PROMOTION" or Face a "CONFRONTATION." On June 24, 1996, the day Harnish received her evaluation, she complained in writing. She wanted it increased. She indicated that if Mitchell did not assist her in her "QUEST FOR A PROMOTION," there would be a "CONFRONTATION" that would have an "ADVERSE EFFECT." (R2705). (caps orig.)

Threat of a "CRIMINAL ACTION" Because of Unhappiness With Performance Evaluation. On June 25,

1996, the first day after her evaluation, Harnish sent a document to O'Hare. She referred to work, to a police report, and wrote, "I DON'T BELIEVE THIS CRIMINAL ACTION WOULD BENEFIT AA." (R2705-06). (caps orig.) In deposition, Harnish dispositively admitted that her unhappiness with her performance rating was a reason that she raised the specter of a "CRIMINAL ACTION." (R4269).

Increase My Performance Rating Versus Facing Embarrassing Rape Investigation. On or about June 28, 1996, Harnish met with O'Hare. According to Harnish, she said her evaluation needed to be increased, and the next thing she said was that a rape investigation would be embarrassing to AA. (R2518 and 2522). It was not until June 28, 1996 – just days after her evaluation – that Harnish first reported to AA the alleged rape that had supposedly occurred over 200 days in the past. (R2321).

D. Harnish Admits Material Omissions.

At her meeting with O'Hare, Harnish said she had been raped by Hill. (R2519-21; 2724-34). However, at that meeting Harnish omitted significant facts that, when discovered, cast a different light on her original allegation. The omitted facts include: (1) drinking over an eight hour period and having been "bounced" on the grounds that she was drunk (R2546; 2529; 2552-53; 2557-59); (2) asking Hill if he wanted a "blow job" and unzipping his pants (R2737); (3) returning Hill's kisses (R2568), pulling her pants down and pulling one leg out (R2735-38), and during the act of intercourse, telling her best friend (Rogstad) to "Go away." (Id.); (4) in March 1996, requesting to be reassigned so she would be directly subordinate to the man who had allegedly raped her (R2479-80); (5) in June 1996, having written that working with Hill had been a "pleasure" (R2669-70) and attending an unofficial going-away party for Hill; (6) the day after the alleged

rape, calling Hill and apologizing; and (7) refusing to press criminal charges. (R2522-23).

E. The Investigation Otherwise Places Harnish's Trustworthiness in Doubt.

Harnish had depicted Hill as the aggressor. But Harnish's best friend, Rogstad, gave a written statement attesting that, in the car during the return trip from Cowboys, Harnish was teasing Hill and grabbing his crotch area. (R2841-42).

In his written statement, McKanna confirmed that, through an open door, he had seen Harnish and Hill engaged in the act of intercourse. Before he could leave, Harnish and Hill looked directly at McKanna. She had not cried for help. (R2848-49).

VII. The Decision to Discharge Harnish and Hill.

American's security presented its findings to O'Hare, Wallace, and Barbara Landers on June 23, 1996. (R2826-27). Wallace made the decision to terminate the employment of both Harnish and Hill. (R2827).[1]

With respect to Hill, he had been intimate with a subordinate employee and later had given a performance evaluation to her. (R4493). Thus he was discharged for having exercised poor judgment. (R2827).

With regard to Harnish, she was not discharged for the act of making a report or complaint. (R4492). Rather, in the work context, American necessarily and reasonably had to be able to rely on Harnish, a management employee, to report facts accurately and truthfully.

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[1] Hill signed an agreement that released all claims in exchange for payment of money under a pre-existing formula. Harnish refused to sign such an agreement.

(R4490-91). By any reasonable objective standard, Harnish had "mischaracterized" facts (R4491), misrepresented facts or did not tell the "truth" (R4492), made "serious omissions" (R4490), and acted with an "ulterior motive." (R4490). Therefore, Wallace concluded that American could no longer "trust" Harnish's "judgment as a supervisor." (R4490-92). Accordingly, AA terminated Harnish's employment on July 28, 1996 for the legitimate, non-discriminatory reason of exercising poor judgment. (Id.; R2739).

REASONS FOR DENYING WRIT

This is a garden variety Title VII discrimination/retaliation case in which summary judgment was correctly granted and affirmed. The actual facts of the case do not present the Court with any important legal issues. The Petition does not claim that the opinions of circuits are in conflict. Although the Petition inveighs against the procedural tool of summary judgment, this case does not call on the Court to add to existing summary judgment standards.

I. The Lower Courts Correctly Held That Harnish's Claims Based Upon Events Occurring on or Before October 4, 1995, are Barred by Limitations.

A Title VII plaintiff in a deferral state must file a charge of discrimination with the EEOC within 300 days after the occurrence of the unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). Harnish filed her initial charge of discrimination on July 30, 1996. (R2811-12). Thus, she may only recover under Title VII for conduct that occurred after October 4, 1995.

Although the Petition (p. 29) uses the phrases "continuing violation"/"equitable tolling" and "equitable estoppel" interchangeably, these defenses are distinct.

Rhodes v. Guiberson Oil Tools, 927 F.2d 876, 878 (5th Cir.), *cert. denied*, 112 S.Ct. 198 (1991). Nonetheless, none apply to this case.[2]

A. Equitable Tolling/Continuing Violation.

"Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act." *Rhodes*, 927 F.2d at 878. If the plaintiff could not have, by the exercise of reasonable diligence, discovered essential facts giving rise to her claim, limitations will be tolled. *Id.* The same analytical approach applies to the so-called continuing violation theory. *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 537 (5th Cir. 1998) (plaintiff's perception that conduct was offensive and sexual in nature "triggered [her] duty to assert her rights"); *Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 402 (1st Cir. 1990) (where plaintiff admitted believing that he was being discriminated against at the time of the alleged discriminatory act, he had an obligation to file promptly or lose his claim); *Washington v. Occidental Chem. Corp.*, 24 F. Supp.2d 713, 724 (S.D. Tex. 1998) (plaintiff cannot assert ignorance of claim while having made numerous complaints concerning alleged harassment).

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[2] The petition suggests that *Nat. RR Passenger Corp v. Morgan*, No. 00-1614 (certiorari granted April 23, 2001) is somehow relevant to the case *sub judice*. The suggestion is misguided. The issue in that case is whether the time-barred claims are sufficiently related to claims not time-barred so as to allow the plaintiff to sue based on the time-barred claims. In contrast, in the case *sub judice*, the time-barred claims relate to Wilkshire, McKanna, and Bowers, whereas the claims not time-barred relate to Hill. The gap from October 1995 through June 1996 refutes any suggestion that the acts of Wilkshire, Bowers, and McKanna were continuing.

In the present case, Harnish admits that she knew of the sexually discriminatory nature of the alleged harassing conduct at the time it occurred and thought that it could affect her employment. (R2591-93). She also claims to have repeatedly complained about those alleged acts, and she consulted an attorney concerning her rights with respect to the alleged harassment. (R2318-19; 2453-55; 2578-79; 2593). Consequently, she cannot claim the benefit of equitable tolling/continuing violation. *Webb, supra*; and *Sabree, supra*.

Similarly, Harnish cannot claim the benefit of equitable tolling due to her emotional state following the alleged rape. First, Harnish did not present any expert testimony to the effect that she was mentally incapacitated. Her claim of mental incapacity relies solely upon inadmissible conclusory statements in her own self-serving affidavit to which objection was made below. Second, Harnish consulted an attorney in August 1995 and again in December 1995. (R2593; 4622). The fact that she retained counsel indicates that "her mental state did not prevent her from pursuing her legal rights under Title VII during the filing period." *Hood v. Sears Roebuck & Co.*, 168 F.3d 231, 233 (5th Cir. 1999); *accord Lopez v. Citibank, N.A.*, 808 F.2d 905, 907 (1st Cir. 1987).

B. Equitable Estoppel.

Equitable estoppel focuses on the employer's misconduct, not the employee's ignorance. *Rhodes*, 927 F.2d at 878. The doctrine requires that the employer affirmatively conceal or misrepresent facts, thereby causing an employee, in reliance, not to assert her rights within the limitations period. *Id.* at 878-79. The reliance must be reasonable. *See, e.g., Conaway v. Control Data Corp.*, 955 F.2d 358, 368 (5th Cir.), *cert. denied.*, 113 S.Ct. 186 (1992).

The only evidence submitted by Harnish in support of her contention that she was misled by American's

investigation is a statement in her affidavit that on September 19, 1995, when she filed her complaint concerning alleged harassment by Mark Bowers, "Personnel told [her] that their sexual harassment investigation would be completed in ten days. . . . " (R4623-24). However, this Court has expressly held that "the pendency of a grievance or some other method of collateral review does not toll the running of [Title VII] limitations period." *Delaware State College v. Ricks*, 449 U.S. 249, 261, 101 S.Ct. 498, 505-06 (1980). Moreover, to allow Harnish to obtain the advantage of equitable tolling or estoppel merely because she was given an expected time frame for the internal investigation would render Congress' mandate regarding the accrual of a cause of action meaningless in virtually every case where an internal investigation is performed.

In the absence of evidence that a threat was acted on or an affirmative act that prevented the filing of an EEOC charge, an employee's fear of possible retaliation is insufficient to invoke equitable estoppel. *See Jackson v. Entergy Ops., Inc.*, 1998 WL 101690 at * 6 (E.D. La. March 4, 1998), *aff'd*, 159 F.3d 1356 (5th Cir. 1998); *Gore v. Pee Dee Farm Credit Services*, 1992 WL 373129 at * 5 (D.S.C. October 15, 1992), *aff'd*, 1 F.3d 1233 (4th Cir. 1993). Harnish has not presented evidence that any threat was acted on[3] or that any affirmative act prevented her from filing a timely EEOC charge. Moreover, as the courts in *Jackson* and *Gore*

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[3] Although Harnish implies that the alleged sexual assault was somehow related to her prior complaints of harassment and was intended to prevent her from exercising her legal rights, there is absolutely no competent evidence to support this charge. Also, page 29 of the Petition refers to alleged "actual physical harm" for having filed an internal complaint. The assertion is speculative and conclusory and not supported by competent evidence.

recognized, Congress has provided employees, in circumstances such as those Harnish alleges, with an express remedy – a retaliation claim. *Jackson* at * 6; *Gore* at * 5. Accordingly, as with any equitable doctrine, the application of equitable estoppel is inappropriate where such a legal remedy exists.

II. The Lower Court Correctly Ruled That Harnish Did Not Establish a Viable Claim of Hostile Work Environment Sexual Harassment.

A. Because the Alleged Off-Premises, Off-Duty Sexual Assault of Harnish Cannot be Considered an Unlawful *Employment* Practice, it Cannot Form the Basis of a Title VII Claim Against American.

An alleged off-duty sexual assault, standing alone, cannot support an actionable Title VII claim. Title VII's proscriptions are limited to discrimination "with respect to [an employee's] compensation, terms, conditions, or privileges of employment. . . . " 42 U.S.C. § 2000e-2(a)(1). Thus, Title VII is violated when "the ***workplace*** is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. . . . " *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993) (emphasis added) (internal quotations and cites omitted); *accord Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 1001 (1998). In *Oncale*, this Court stressed the limitation of Title VII to workplace conduct by using the word "workplace" no less than ten times.

Harnish's deposition testimony conclusively establishes that the events of December 3, 1995, were not employment related. To be with her friend Rogstad, Harnish went to Scoreboards, continued on to Hill's house,

went to Cowboys, and returned to Hill's house. (R2527; 2542-51; 2527; 2551; 2622-23; and 2622-23).

The only evidence connecting Harnish's employment and her presence at the bars and parties on December 3, 1995, is her own conclusory subjective statement that she "felt compelled to attend the day's social activities in order to maintain a good working relationship with her supervisors. . . . " (Pet. p. 26). Aside from her inadmissible statement in her affidavit that contradicts her deposition testimony,[4] Harnish fails to direct the Court to any objectively ascertainable acts by American supervisors that compelled her attendance.[5]

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[4] *See Wright, Miller & Kane,* Federal Practice and Procedure Civil 3d § 2726 at p. 452. ("It seems quite clearly correct to conclude that an interested witness who has given clear answers to unambiguous questions cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, without providing a satisfactory explanation of why the testimony is changed."). Before the lower courts, AA objected to this and other inadmissible evidence.

[5] Harnish attempts to create a misimpression by playing footloose with dates and titles. Relying on statements to the effect that Hill was one of her "administrative shift managers," Harnish asserts that he was a supervisor with immediate authority over her at the time of the alleged rape. (R4199). It is the administrative shift manager who prepares a supervisor's performance evaluation and can impose discipline. However, Harnish stipulated that Hill did not become her administrative shift manager until March 1996. (R3223). Consequently, by Harnish's own definition (*i.e.*, administrative shift manager), Hill was not her manager or supervisor as of December 3, 1995.

B. The 1996 Performance Evaluation and Occasional Non-Assignment of Temporary Tasks Do Not Remotely Establish Sexual Harassment Claims.

Harnish's speculation is not an adequate substitute for competent evidence from which a rational factfinder could reasonably infer that a causal nexus exists between the June 1996 evaluation and Harnish's rejection or acceptance of the alleged December 1995 assault. The June 1996 evaluation was not an act of a sexual nature. It bears no logical nexus to the earlier assault, and the disagreement between Hill and Harnish as to whether all relevant items had been completed does not magically transform the evaluation into something that it is not. Contrary to what the Petition argues, in deposition Harnish admitted that she did not expect a high evaluation. (R4261). The June 1996 evaluation was not poor. Rather, the rating was "Fully Competent" and her promotability was tracked as "S", both of which were good ratings in light of Harnish's many admitted deficiencies. (Counterstatement of Case § IV). The 1996 evaluation was as good or better than the 1995 evaluation and would have allowed Harnish to be promoted to the next level.[6]

Likewise, Harnish's speculation is not a substitute for evidence from which a rational factfinder could reasonably infer a causal nexus between the alleged December 1995 assault and the occasional non-assignment of Harnish to temporary tasks she preferred. The non-assignment was not a sexual act and bears no logical nexus to the alleged assault. Hill was Harnish's administrative

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[6] Since the 1996 evaluation was not poor and did not inflict "direct economic harm," it was not a tangible employment action. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762, 118 S.Ct. 2257, 2269 (1998); and *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 n. 11 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 798 (1999).

shift manager for less than four months. Harnish was one of the least senior of 40 to 45 supervisors. Most task assignments were made based on seniority. (R4263 and 4337). There were nine or ten shift managers to make assignments. It is illogical to suggest that Hill could or should have pulled Harnish from regular supervisory tasks (that she was in the process of learning) and given her every other assignment she preferred, to the exclusion of other supervisors, especially ones more senior than Harnish.[7] Moreover, Harnish did not raise this issue in her EEOC charge despite the assistance of an attorney. (R2811-12; 2813-14; 2629). Thus, it may not form a basis for a Title VII suit. *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993).

C. The Alleged Post-October 4, 1995 Sexual Acts are Not Severe or Pervasive Enough to Create an Objectively Hostile or Abusive Work Environment.

Title VII is not a general civility code for the workplace. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir. 1999). "[I]t forbids only behavior so objectively offensive as to alter the conditions of the victim's employment." *Oncale*, 523 U.S. at 81. For conduct to alter the conditions of a person's employment, it must be so severe and pervasive that it creates an environment that a reasonable person would find hostile or abusive. *Harris*, 510 U.S. at 24.

Other than the alleged off-duty, off-premises sexual assault which is not employment related, the only post-October 4, 1995 alleged sexual acts consist solely of (1) in October/November 1995, Hill approached Harnish at a

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[7] The occasional non-assignment to temporary tasks Harnish preferred did not inflict direct economic harm and is not a tangible employment action. *Ellerth, supra*; and *Douglas, supra*.

bar, either sat close or leaned into her, and invited her and others to attend a party (and she declined the invitation) and (2) conclusory hearsay about the off-premises, off-duty overhearing unidentified co-workers tell some non-specific sex story about Hill. (R2563-64; 2315-16). As a matter of law, these conclusory, isolated incidents fall far short of the type of severe or pervasive and extreme conduct that may alter the terms and conditions of employment. *See, e.g., Cowan v. Prudential Ins. Co.*, 141 F.3d 751, 756, 758 (7th Cir. 1998) (incidents including occasional boasting of exploits at a strip club not severe or pervasive); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823-26 (6th Cir.), *cert. denied*, 118 S.Ct. 172 (1997) (sexual comments, most of which were not directed at plaintiff, were not severe enough to create an objectively hostile environment).

D. Harnish Failed to Establish a Causal Nexus Between Her Acceptance/Rejection of the Alleged Assault and Her Discharge.

The only post-transfer tangible employment action was the discharge of Harnish. To establish a *prima facie* case, Harnish would have to show evidence supporting an inference of a causal nexus between her July 1996 discharge and her acceptance or rejection of the alleged assault of December 3, 1995. *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000).

The fact that American conducted an independent investigation into Harnish's claims, combined with the fact that Wallace made the decision to discharge both Harnish and Hill, conclusively disproves any alleged causal link between Harnish's discharge and her acceptance/rejection of the alleged assault of December 3, 1995. *See Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996).

III. The Lower Courts Correctly Ruled That Harnish Did Not Raise a Genuine Issue of Material Fact on Her Retaliation Claim.

To prove a *prima facie* case of retaliation, Harnish must show that: (1) she has engaged in activity protected by Title VII; (2) AA took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse employment action. *See Burger v. Central Apartment Management, Inc.*, 168 F.3d 875, 878 (5th Cir. 1999). If Harnish succeeds in proving a *prima facie* case, the burden of going forward shifts to AA to provide a non-retaliatory explanation for the adverse employment action. *See Long*, 88 F.3d at 305. Once AA shows a neutral, non-retaliatory reason for its actions, it is Harnish's burden of proof to demonstrate pretext, *i.e.*, that ultimately she would not have suffered the adverse employment action but for her protected conduct. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, 113 S.Ct. 2742, 2747-48 (1993); *see Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000); and *Long*, 88 F.3d at 305 n.4, 308; *Douglas*, 144 F.3d at 372.

The first element of the *prima facie* case, protected activity, can arise under the "participation" or the "opposition" clause of 42 U.S.C. § 2000e-3(a). The scope of the "participation" clause protects one who has made a charge, testified, assisted, or participates in "an investigation, proceeding or hearing under this subchapter." *Id.* The participation clause affords extraordinarily broad protection to persons who participate in an administrative or judicial Title VII proceeding. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n. 18 (5th Cir. 1969). However, prior to her discharge, Harnish had not participated in any Title VII administrative or judicial proceeding. Thus, she cannot invoke the participation clause.

The scope of the opposition clause is limited to opposition to unlawful *employment* practices. 42 U.S.C. § 2000e-3. While the practice opposed need not be found

ultimately unlawful, the opposition clause does not protect unwarranted, unreasonable, or bad faith statements. The employee must have had an objective and reasonable belief that the act opposed violated Title VII. Recently, the Court accepted without deciding this standard. *See Clark County School District v. Breeden*, 121 S.Ct. 1508, 1510 (2001). *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000); *Wilson v. UT Health Center*, 973 F.2d 1263, 1268 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1644 (1993) (knowingly false charges, not in the context of an EEOC charge, are not protected by the opposition clause); *Volberg v. Pataki*, 917 F. Supp. 909, 914-15 (N.D.N.Y.), *aff'd.*, 112 F.3d 507 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 1252 (1997) (employee's belief could not have been held in good faith, where he knew that his layoff had resulted from employer's seniority system). Harnish filed an intra-company complaint in June 1996 and can claim protection only under the opposition clause.[8]

A. Harnish Did Not Establish a *Prima Facie* Case Because Her Complaints to O'Hare Were Not a Protected Activity Under the Opposition Clause of Title VII.

It is Harnish's burden to demonstrate that the following were employment practices and that she had an objective and reasonable belief that the acts about which she complained were both unlawful and employment practices: 1) "EXTENSIVE SEXUAL ABUSE" on the ramp that supposedly was "GETTING WORSE;" 2) her 1996 evaluation was an "INSULT" and was so poor that it

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[8] Pages 22-24 of Harnish's Petition confuse the fundamental distinction between the opposition clause and the participation clause. She refers to both clauses. She relies upon cases that are inapposite because they were not decided under the opposition clause.

would "ruin" her career; and 3) the alleged off-duty, off-premises rape by Hill.

1. The Complaint About "EXTENSIVE SEXUAL ABUSE" That Had "GOTTEN WORSE" Was Not Protected Because Harnish Admits it Lacked an Objective and Reasonable Basis.

In deposition, Harnish admitted facts establishing the falsity of her June 1996 complaint that there was "EXTENSIVE SEXUAL ABUSE ON THE RAMP" and that it had "GOTTEN WORSE." (R2706). Counterstatement of Case § VI.A. The record contains no evidence explaining how Harnish's admittedly false accusation could have been objective and reasonable. *See, e.g., Byers,* 209 F.3d at 428-29 (analyzing factual basis of numerous complaints of race discrimination and holding none were objective and reasonable); *Bradley v. CMI Indus., Inc.,* 17 F. Supp.2d 491, 497 (W.D.N.C. 1998) (falsity of plaintiff's complaint demonstrates unreasonableness of purported belief that sexual harassment had occurred).

2. The Complaint About the June 1996 Performance Review Was Not Protected Because it Lacked an Objective and Reasonable Basis.

Although Harnish complained that her evaluation was an "INSULT" (R2705), in deposition she admitted it was not an insult. (R2506). No reasonable person could have objectively concluded that the evaluation was so poor it would "ruin" her career and "jeopardize" her job. Counterstatement of Case § VI.B. Since a "fully satisfactory" rating cannot be retaliatory as a matter of law, Harnish could not have had an objective and reasonable belief that it was in fact retaliatory. *See Douglas,* 144 F.3d at 373 n. 11. Nor did Harnish have an objective and reasonable belief that an "S" tracking would "ruin" her career and "jeopardize" her job. The tracking addresses

promotability, not retention/nonretention. She admits that she could be promoted with an "S" tracking. Given her relative inexperience in Ramp Services and many performance deficiencies (Counterstatement of Case § IV), "S" was a good rating.

3. The Complaint About the Alleged Sexual Assault Was Not Protected Because it Was Not Employment-Related and Also Because it Was Used for Ulterior Motive.

"Opposition" is not protected unless it addresses an employment practice within the scope of Title VII. *See Sarff v. Continental Express*, 894 F. Supp. 1076, 1082 (S.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996) (plaintiff's opposition to discrimination based on sexual orientation was not protected by Title VII because the conduct complained of was not the type of conduct proscribed by Title VII); *Harvey v. Chevron U.S.A., Inc.*, 961 F. Supp. 1017, 1033 (S.D. Tex. 1997) (finding that complaint about favoritism to a paramour is not a protected activity).

In the present case, in deposition, Harnish admitted facts conclusively proving the alleged off-duty, off-premises sexual assault of December 1995 was not employment-related. Counterstatement of Case § III. Thus, it was not protected and cannot be the basis for a retaliation claim. Moreover, Harnish admitted that a reason she brought up the alleged assault was the ulterior motive that she was unhappy with her evaluation and wanted it increased. However, as explained above, her complaint about her evaluation was not objective and reasonable.

B. Assuming That Harnish has Established a *Prima Facie* Case of Retaliation, Then She Failed to Establish Pretext.

1. Harnish's Employment was Terminated For a Legitimate, Non-Retaliatory Reason.

The discharge of an employee for making misrepresentations, even if during the course of a sexual harassment investigation instigated by the employee, is legitimate and non-retaliatory. *See Wilson*, 973 F.2d at 1267 (affirming judgment of district court that concluded that employee's misrepresentations, not her reports of sexual harassment, caused her termination); *see also Vasconcelos v. Meese*, 907 F.2d 111, 112 (9th Cir. 1990) (employer had a legitimate, non-discriminatory reason for terminating employee who lied about involuntary nature of complained of sexual encounter with her supervisor).

As documented in Counterstatement of the Case § IV.A., Harnish admitted that her June 1996 claim about "EXTENSIVE SEXUAL ABUSE" that had "GOTTEN WORSE" was a misrepresentation. Contrary to her assertion, her 1996 evaluation could not reasonably be construed as being so poor it would "ruin" her career. Harnish admitted the falsity of her assertion that the evaluation was an "INSULT." *See* Counterstatement of Case § VI.B. She admitted a reason she had raised the specter of a "CRIMINAL ACTION" was the ulterior motive that she was unhappy with her June 1996 performance evaluation and wanted it increased. As a level 3 supervisor and despite many admitted performance deficiencies, she was on a "QUEST FOR PROMOTION" and wanted to skip level 4 and move into the level 5 position Hill was vacating. *See* Counterstatement of Case § VI.C.

When Harnish made the rape allegation to O'Hare on June 28, 1996, she had waited well over six months before bringing it up and admits that a reason she brought up the allegations was because she wanted her performance evaluation increased. When speaking to O'Hare, she did

not mention any of the events that, once learned, cast a different light on the rape allegation. (Counterstatement of Case §§ VI.C. and D.).

Other witnesses cast suspicion on Harnish's truthfulness. *See* Counterstatement of Case § VI.E.

Following the investigation, Wallace made the decision to terminate the employment of both Hill and Harnish. With respect to Harnish, Wallace reached the good faith reasonable belief that he could no longer trust and rely on her judgment – as a member of management – to report facts accurately and truthfully. She was thus discharged for "poor judgment." *See* Counterstatement of Case § VII.

2. Harnish Failed to Sustain Her Burden to Establish Pretext.

The *Reeves* opinion clarified the burden shifting framework. "[T]he *prima facie* case, combined with sufficient evidence that the employer's asserted justification is false, ***may*** permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S.Ct. at 2109 (emphasis added). However, "This is not to say that such a showing by the plaintiff will ***always*** be adequate to sustain a jury's finding of liability." *Id.* (emphasis orig.). Factors to examine "include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered. . . . " *Id.*

In *Reeves*, this Court examined whether the *prima facie* case and evidence of pretext were strong or weak. *Id.* at 2107-09. Reeves established a strong *prima facie* case. The supervisor who had made the actual discharge decision had made many comments demonstrating clear age animus. *Id.* at 2111. Reeves also made a strong showing that the employer's reason for discharge was false. One reason for the plaintiff's discharge was not properly

maintaining records which caused employees to be paid for hours not worked, but the plaintiff had actually been in the hospital during the timeframe in question. *Id.* at 2107. Another reason for the plaintiff's discharge was failing to discipline tardy employees, but it was not the plaintiff's job to discipline tardy employees. (*Id.*).

As the *Reeves* opinion states, the probative evidence of falsity must be examined in light of all evidence that supports the employer's reason for discharge. In some cases, as in *Reeves*, the probative value of falsity may be strong. In other cases, the probative value may be weak and not sufficient to avoid summary judgment. *Id.* at 2109. For example, following an internal investigation, there is no retaliation when circumstances "give the employer good reason to believe that the fictitious version was the result of knowingly false statements. . . . " *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000). The complainant's mere subjective opinion that he/she did not make misrepresentations and that an employer should have reached a different conclusion is not sufficient to create a fact issue that will avoid summary judgment. *Id.; Jasmantus v. Subaru-Isuzu Automotive, Inc.*, 139 F.3d 1155, 1157 (7th Cir. 1998); and *Wilson*, 973 F.3d at 1268. Indeed, since the employer's motive is the ultimate issue, even an incorrect but good faith belief does not necessarily establish pretext. *Little v. Republic Refining Co. Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991).

Here, Harnish's reliance on *Reeves* is misguided. In deposition, Harnish admitted facts substantiating Wallace's conclusion. She admitted to multiple misrepresentations and mischaracterizations (Counterstatement of the Case § VI.A. and B.); she admitted facts demonstrating her ulterior motive (*Id.* § VI.C.); and she admitted many material omissions (*Id.* § VI.D.). Hence, as a result of her own testimony, Harnish failed to establish the falsity of Wallace's conclusion that he disbelieved and could not trust her.

Ignoring her overwhelming and dispositive admissions, the Petition latches onto an isolated point and argues that Wallace's decision not to credit Harnish's rape allegation entitles her to a jury trial. This argument misses the mark. First, against the overall background of her damning admissions, the one isolated point does not rise to the level of "a substantial showing" that Wallace's conclusion – that he did not trust Harnish – was false. *Reeves*, 120 S.Ct. at 2107. Second, Harnish does not argue that facts supporting Wallace's conclusion are false. To the contrary, she admits that she omitted material facts, that she acted with ulterior motive, and that she made misrepresentations and mischaracterizations. Based on Harnish's admissions, which conclusively reveal non-discriminatory reasons for her discharge and demonstrate the extreme weakness of her evidence of pretext, AA is entitled to judgment as a matter of law. *Reeves*, 120 S.Ct. at 2109. Third, Harnish does not present evidence questioning the good faith nature of Wallace's conclusion. Unlike the facts in *Reeves, supra*, where the actual decision-maker had made multiple discriminatory remarks, here there is no evidence that Wallace made discriminatory or retaliatory remarks. Hence, any *prima facie* case that Harnish might arguably establish is too weak to enable her to avoid summary judgment. *Reeves*, 120 S.Ct. at 2111.

Harnish's other argument also lacks merit. Wallace testified that Harnish was discharged for demonstrating poor judgment as a supervisor because of her misrepresentations, mischaracterizations, ulterior motives, and omissions. (R2823-25). Harnish asserts this is inconsistent with a statement in an EEOC filing stating that Harnish demonstrated poor judgment by engaging in oral sex in public. Based on a misunderstanding and misapplication of *Reeves*, Harnish argues that this is sufficient evidence of falsity to entitle her to avoid summary judgment. This argument also misses the mark. First, *Reeves* spoke of "a

substantial showing" the employer's reasons are false. *Reeves*, 120 S.Ct. at 2107. Neither the reason given in Wallace's deposition, nor that asserted in the EEOC response, is inconsistent with the reason stated in the discharge letter given to Harnish. (R2739). Thus, at most, her evidence of falsity is the slight circumstantial evidence that the two subsequent explanations, although consistent with the original stated reason, are somewhat inconsistent. Slight circumstantial evidence is not a "substantial showing." *Reeves*, 120 S.Ct. at 2107.

Second, and dispositively, *Reeves* explicitly recognized that in some cases there may be some evidence of falsity but in light of other evidence "no rational factfinder could conclude that the action was discriminatory." *Reeves*, 120 S.Ct. at 2109. Here, assuming that the EEOC response is some evidence of falsity, other evidence conclusively establishes the absence of retaliation. Specifically, Harnish's own deposition admissions (to misrepresentations, mischaracterizations, ulterior motive, and significant omissions) are "abundant and uncontroverted evidence" that establish the absence of retaliation. *Id.*

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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